

In The Matter of Merchant Mariner's Document No.Z90878-D5
Issued to: WILLIAM A. BURKE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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WILLIAM A. BURKE

This appeal comes before me by virtue of 46 United States Code 239(g) and 46 Code of Federal Regulations 137.11-1.

Appellant was charged with misconduct before an Examiner of the United States Coast Guard on June 13 and 15, 1949, at New York, supported by two specifications alleging that while serving as oiler on the SS CONRAD WEISER under authority of his Merchant Mariner's Document No. Z-90878-D5, he

1. On or about 19 March, 1947, while the vessel was in Hamburg, Germany, absented himself from the vessel without proper authority; and
2. Failed to join said vessel without reasonable cause when it departed Hamburg, Germany, on March 20, 1947.

To the charge and each specification, Appellant pleaded "not guilty." Evidence introduced by the Investigating Officer consisted of a certified copy of an abstract from the official log of the SS CONRAD WEISER for the voyage ending April 16, 1947, and a certified copy of the abstract of Shipping Articles of said vessel relating to Appellant. (Exhibits attached to the record) The log entry referred to reads as follows:

March 20th, 1947

William A. Burke found absent on sailing 5 A.M. this date, all liberty having been stopped at 00:01 March 19th and no permission having been granted for leaving the ship, said Burke is declared a deserter and all pay and effects forfeited.

/s/ Carl H. Fuhr
Chief Engr.

/s/ P. Moore
Master"

That part of the log entry purporting to declare Appellant a deserter is not pertinent to the offenses involved; and furthermore is without evidential value and constitutes but a bare conclusion unsupported by facts upon which such conclusion is based. The balance of the log entry is considered just sufficient to make out a prima facie case.

To rebut the evidence presented against him, Appellant testified, in effect, that he went on liberty with permission; that such liberty commenced at 10 P.M., March 19, 1947; and that upon returning about 7:15 or 7:30 A.M., March 20, 1947, he discovered the vessel had sailed at 5 A.M. that morning. He further testified that while the vessel's departure time had been posted some three days earlier, the vessel's departure had been prevented because of ice conditions, and that no notice of specific sailing time had been posted to the effect that the vessel would in fact depart on the morning of March 20, 1947.

Where a log entry of the kind used in this case is introduced by the Investigating Officer as a medium of evidence, he should anticipate rebutting testimony as given by Appellant, by introducing corroborating evidence in the nature of testimony of qualified witnesses, if available. If not presently available, a short delay in the hearing would be justified to assure the presence of such witnesses. In the absence of such corroborating testimony, the Hearing Examiner is faced with the difficult problem of weighing the testimony of Appellant against the prima facie case presented by the Investigating Officer. To aid him in the proper exercise of his duty, the Hearing Examiner is entitled to a full disclosure of all evidence available in the case under consideration.

The Hearing Examiner in this case apparently considered that the prima facie case was not overcome by the testimony of Appellant (Kwasizur v. Cardillo, 175 F2d 235, 237); and, accordingly, found the charge and both specifications proved and entered an order suspending Appellant's merchant mariner's document for two years.

CONCLUSION

Subject to the foregoing remarks, I am constrained to uphold the findings of the Examiner in this case, as well as that part of the order relating to suspension; however, with respect to the period of suspension, I consider that a suspension for one year will accomplish as useful a purpose as the period ordered.

It is, therefore

ORDERED AND DIRECTED that the order of the Examiner dated at New York, New York, on 15 June, 1949, be modified to provide for the suspension of Appellant's Merchant Mariner's Document No. Z-90878-D5, for one year, effective upon the date he surrenders said document or any duplicate issued in lieu thereof; and that as so MODIFIED, said original order is AFFIRMED.

MERLIN O'NEILL
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 20th day of Oct, 1949.